Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	**RM- 10856**
Joint Petition for Rulemaking to Resolve	)	
Various Outstanding Issues Concerning the	)	
Implementation of the Communications	)	
Assistance for Law Enforcement Act	)	
	)	

REPLY COMMENTS OF NET2PHONE, INC.; NET2PHONE GLOBAL SERVICES, LLC; AND NET2PHONE CABLE TELEPHONY, LLC.

Net2Phone, Inc.; Net2Phone Global Services, LLC, and Net2Phone Cable Telephony, LLC, (collectively "Net2Phone") respectfully submit these Reply Comments to the comments filed in response to the Joint Petition for Expedited Rulemaking filed by the United States Department of Justice ("DOJ"), the Federal Bureau of Investigation ("FBI"), and the U.S. Drug Enforcement Administration ("DEA") ("Law Enforcement" or "Petitioners")[1] associated with implementation of the Communications Assistance for Law Enforcement Act ("CALEA").[2] Among the issues of particular concern to Net2Phone are Petitioners' requests that the Commission:

I. Determine that CALEA's information services exemption is narrow and issue a Declaratory Ruling or other formal statement that CALEA's definition of "telecommunications carrier" is different from, and broader than, the Communications Act's definition of the term;[3] and clarify that CALEA

[1] *See Joint Petition for Expedited Rulemaking of the United States Department of Justice, Federal Bureau of Investigation and Drug Enforcement Administration,* RM-10865 (filed March 10) ("Petition").
[2] Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified as amended in sections of 18 U.S.C. and 47 U.S.C. § 1001 *et seq.*).
[3] Petition at 15 and 22, citing Telecommunications Act of 1996, Pub. L. No. 104-104, 110 State. 56 (codified at 47 U.S.C. §§151 et. seq.) ("Communications Act").

applies to other packet-mode services, such as broadband access and broadband telephony service;[4]

II. Adopt rules for easier identification of future covered services stating that: 1) a service that competes against a service already deemed subject to CALEA is presumptively covered by CALEA; 2) an entity engaged in providing wire or electronic communications switching or transmission service to the public for a fee is covered by CALEA; and 3) a service using any packet-mode technology covered by CALEA that begins to provide a different technology will continue to be subject to CALEA;[5]

III. Require carriers that believe that their current or planned equipment, facilities, or services are not subject to CALEA to file a petition for clarification with the Commission prior to offering the service.[6]

In order to approve the Petition, the Commission must make the following determinations: define the term "telecommunications carrier" so broadly as to nullify CALEA's express exemption of information services to the detriment of innovation, competition, and privacy; ignore CALEA's procedures in favor of rewriting the statute to cover future services; and ignore the significant negative public policy implications of circumventing the express language of CALEA and Congressional intent.

Net2Phone urges the Commission to deny the Petition and refrain from implementing CALEA in a manner that contravenes the very purpose of the statute: (1) to preserve a narrowly focused capability for law enforcement agencies to carry out properly authorized intercepts; (2) to protect privacy in the face of increasingly powerful and personally revealing technologies; and (3) to avoid impeding the development of new communications services and technologies.[7]

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[4] Id at 15, 25, 30-31.
[5] Petition at 33-34.
[6] Petition at 34.
[7] H.R. Rep. No. 103-287(1) (1994), *reprinted in* 1994 U.S.C.C.A.N. 3489 ("House Report" or "Legislative History").

Net2Phone recognizes the intense concerns that Law Enforcement has with security matters at this time, but, for the reasons stated herein, believe that denial of the Petition would not compromise security. Although the recommendations advanced by Petitioners' do not address the security concerns raised, they do threaten to upset the delicate balance created by Congress in enacting CALEA. Accordingly, while Net2Phone continues to strongly support Law Enforcement's need to accomplish electronic surveillance and works diligently with government agencies in that regard, Net2Phone cannot support Petitioners' requests because approval of the Petition would contravene the express policy goals envisioned by Congress and the plain language of CALEA.

I. Proper Statutory Construction Requires Denial Of The Petition

A. CALEA Contains A Broad Exemption For "Information Services."

CALEA expressly exempts all, "persons or entities insofar as they are engaged in providing information services". [8] In other words, CALEA applies only to those services that do not fall within the category of information services. CALEA's information services exemption also serves as a check on CALEA's overall scope because it covers both definitions of "telecommunications carrier" in the statute.[9] Rather than properly focus on CALEA's clear information services exemption, Petitioners rely on an overly broad interpretation of the term "telecommunications carrier."[10] Petitioners' interpretation is overly broad because it potentially encompasses all services falling squarely within the information services category such as broadband access and

[8] 47 U.S.C. §1001(8)(C)(i). *See also,* Comments of WorldCom Inc., d/b/a MCI ("MCI"), at 12.
[9] *See also*, 47 U.S.C. 1002(b)(2)(A), listing information services as a limitation on CALEA's capability requirements.
[10] 47 U.S.C. §1001(8) (A,B).

broadband telephony. The Commission should reject this approach as contrary to the plain language of CALEA and Congress' intent.

As it did in the Second Report and Order,[11] the Commission should look to legislative history, structure of the statute, and the purpose for which CALEA was enacted in examining the meaning of the statute's terms.[12]

The origins of the information services classification were the Commission's *Computer* decisions, where the Commission developed separate categories of "enhanced" and "basic" services.[13] The Commission defined "basic service" as the provision of "pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer-supplied information."[14] By contrast, enhanced services referred to:

> "services, offered over common carrier transmission facilities used in interstate communications which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information."[15]

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[11] *See Communications Assistance for Law Enforcement Act,* Second Report and Order, FCC 99-229, CC Docket No. 97-213, 15 FCC Rcd 7105, 711 ("We conclude that the language and legislative history of CALEA provide sufficient guidance as to what the term 'Telecommunications carrier' means, such that it can be applied to particular carriers, their offerings and facilities.") at¶9; (" The legislative history of CALEA makes clear that the requirements of CALEA doe not necessarily apply to all offerings of a carrier…", noting that "Subsection 102(8)(C) of the definition specifically excludes information services…") at ¶12.

[12] *See Chevron U.S.A.,Inc. v. National Resources Defense Council,* 467 U.S. 837 (1984). *See also* MCI at 11.

[13] 47 U.S.C. §153(20). *See also, Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities*, 28 FCC 2s 267 (1971) ("*Computer I*"); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry),*77 FCC 2d 384 (1980) ("*Computer II*") (Collectively, "*Computer* decisions"); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1943,* 11 FCC Rcd 21905 (1996); *In the matter of Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, 13 FCC Rcd 11501, Release Number 98-67, (released April 10, 1998), (*Report to Congress*) .

[14] *Computer II* at 420.

[15] *Id. See also* 47 C.F.R. § 64.702.

Incorporating the Commission's enhanced services definition, the *MFJ* defined the term information services as the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications…"[16] The definitions established in the *Computer* inquiries and the *MFJ* were later codified in the Communications Act, where "enhanced services fell within the broader category of "information services."[17] The Communications Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications…"[18]

CALEA likewise builds on the Commission's prior decisions and the *MFJ* by defining information services as: "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications" and "includes-- (i) a service that permits a customer to retrieve stored information from, or file information for storage in, information storage facilities; (ii) electronic publishing; and (iii) electronic messaging services…"[19]

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[16] *See United States v. Western Elec. Co.,* 552 F. Supp. 131, at 156 (D.D.C. 1982), Modification of Final Judgment, (*"MFJ"*), stating that "enhanced services" are essentially the equivalent of "information services."

[17] Report and Order, *Policy and Rules Concerning the Interstate, Interexchange Marketplace,* 16 FCC Rcd 7418, ¶ 2, n.6 (2001) (stating that "'Enhanced services' are now referred to as 'information services'" and "Congress sought to maintain the basic/enhanced distinction in its definition of 'telecommunications service' and information service" and "enhanced services and information services should be interpreted to extend to the same functions"), *citing* Report to Congress, *Federal-State Joint Board on Universal Service,* 13 FCC Rcd 11501, ¶¶ 33, 39, 45-49 (1998) ("*Report to Congress*"); *see also, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of* 1934, 11 FCC Rcd 21905, at ¶ 102 (1996) ("*Non-Accounting Safeguards Order")* (stating "we conclude that all of the services that the Commission has previously considered to be 'enhanced services' are 'information services'"); *Report to Congress* ¶ 21(that "we find that Congress intended the categories of 'telecommunications service' and 'information service' to parallel the definition of 'basic service' and enhanced service' developed in our Computer II proceeding.").

[18] 47 U.S.C. §153(20).

[19] 47 U.S.C. §1001(6)(i).

Congress was not blind to the Commission's long history of defining information services broadly when it enacted CALEA. Indeed, both CALEA and the Communications Act exclude all information services from the purview of traditional telecommunications regulation. CALEA's Legislative History supports Congress' "intention not to limit the definition of 'information services' to such current services, but rather to anticipate the rapid development of advanced software and to include such software services in the definition of 'information services'," and therefore exempt the broad range of information services from CALEA.[20] In drafting the Communications Act, Congress also excluded information services from the purview of Title II regulation in order to promote innovation.

The similarities between the definitions of information services and the Congressional intent behind the drafting of CALEA and the Communications Act are not accidental. Both statutes make information services and telecommunications services mutually exclusive.[21] Petitioners, however, imply that the mere use of joint-use facilities subsumes the information service component into CALEA thus blurring the express distinction between information services and telecommunications.[22] Adoption of Petitioners' view requires the Commission to apply differing interpretations to statutes that are substantially similar with respect to exempting information services from traditional regulation of telecommunications common carriers. However, this is precisely the result advocated by Petitioners.[23] In rejecting this approach with regards to the

[20] House Report at 3498.
[21] CALEA Second Report and Order ¶27, note 70. *See also,* Comments of the American Civil Liberties Union ("ACLU") at 1.
[22] Petition at 14.
[23] Id. Petitioners incorrectly state that while "CALEA, like the Communications Act, distinguishes between telecommunications and information services, CALEA does not categorically exclude providers of information services from the definition of "telecommunications carrier."

Communications Act, the Commission held that an "approach in which a broad range of information service providers are simultaneously classed as telecommunications carriers, and thus presumptively subject to the broad range of Title II constraints…could seriously curtail the regulatory freedom that the Commission concluded in Computer II was important to the healthy and competitive development of the enhanced-services industry."[24] As stated above, CALEA's information service exemption builds on the same principles to achieve the healthy development of the information services industry.

Consequently, the Commission confirmed its hands-off policy towards the within the context of CALEA by rejecting the FBI's assertion that, "any portion of a telecommunications service provided by a common carrier that is used to provide transport access to information is subject to CALEA's requirement."[25] In the Second Report and Order, the Commission held that CALEA does not apply to the information services portion of joint-use facilities even where a telecommunications service such as DSL is used to provide the information service.[26] The Commission's holding is still relevant because broadband access and broadband telephony services continue to fall within CALEA's information services exemption.[27] Since Petitioners advocate an approach that the Commission has rejected in the past, the Commission should adhere to its existing policies and reject Petitioners' overly narrow interpretation of CALEA's information services exemption.

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[24] *Report to Congress* at ¶46 (*citing Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry),* 77 FCC 2d 384 (1980).
[25] Second Report and Order at ¶¶26-27.
[26] Second Report and Order that an "entity is a telecommunications carrier subject to CALEA to the extent it offers, and with respect to, such services" at ¶11; continuing that "[s]ubsection 102(8)(C) of the definition specifically excludes information services." At¶12; and finally concluding that where "facilities are used to provide both telecommunications and information services, however, such joint-use facilities are subject to CALEA in order to ensure the ability to surveil the telecommunications services."at ¶27.
[27] Comments of EarthLink, Inc, ("EarthLink") at 5.

B. Petitioners Broad Interpretation Of "Telecommunications Carrier" Is Inconsistent With Congress' Intent To Apply A Narrow Scope.

Petitioners state that CALEA's use of the term "telecommunications carrier" requires a much broader statutory reading than that of the Communications Act.[28] Petitioners' analysis is however inconsistent with proper statutory construction and the Commission's prior holdings.[29] CALEA defines "telecommunications carrier" as "a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire"[30] CALEA does not define the term "common carrier" but rather leaves it up to the Commission to determine whether the type of transmission offered by a carrier should be considered a common carrier service subject to CALEA.[31] The Commission must therefore rely on its previous experience in determining whether a service is a common carrier service. The Commission has not found that the type of transmission offered by all of the various broadband services is subject to its common carriage rules. With the single exception of DSL, all broadband services presently fall within CALEA's exemption of information services.

CALEA's Legislative History narrows the statute by explaining that a "'telecommunications carrier' is "any person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire, *as defined by section 3(h) of the Communications Act of 1934*…" and that this definition "encompasses such service providers as local exchange carriers, interexchange carriers,

[28] Petition at 9, 11.
[29] MCI Comments at
[30] 47 U.S.C. 1001(8)(A).
[31] *See Virgin Islands Tel. Corp. v. FCC,* 198 F3d 921 (1999, App DC), finding that the Commission's interpretation of the ambiguous term "telecommunications carrier," to mean essentially the same thing as "common carrier", was reasonable.

competitive access providers (CAPs), cellular carriers, providers of personal communications services (PCS), satellite-based service providers, cable operators and electric or other utilities that provide *telecommunications services* for hire to the public, and any other common carrier that offers wireline or wireless service for hire to the public." (Emphasis added).[32] By referring to the Communications Act of 1934, the term *telecommunications service*, and listing examples of only those carriers subject to the Communications Act as common carriers, Congress clearly intended for CALEA's definitions to track those in the Communications Act.

Congress did not write the two statutes in a vacuum. Rather, Congress built on prior definitions and holdings related to telecommunications and information services. Acknowledging the similarities between the statutes the Commission observed that although CALEA's definition of "telecommunications carrier" is "independent from" the definition of that term in the Communications Act, the Commission expects that "in virtually all cases the definitions of the two Acts will produce the same results…"[33] Notably, the Commission's use of the term "independent from" does not mean "inconsistent with" as Petitioners suggest.[34] Indeed, the Commission's Second Report and Order not only cites to the definitions of "telecommunications" and "information services" under the Communications Act, but also to its own analysis in its *Report to Congress* on various IP-enabled services.[35]

Petitioners also state that CALEA's definitions of "telecommunications carrier" are much broader than the Communications Act's because they "are not limited by the

[32] House Report at 3500.
[33] *Second Report and Order* at ¶13. *See also,* Comments of AT&T Corp., ("AT&T") at 12.
[34] Petition at 14 that (" an entity that is *not* a telecommunications carrier under the Communications Act may nevertheless qualify as a telecommunications carrier under CALEA."
[35] Second Report and Order at note 70.

Communications Act's phrase 'without change in the form or content of the information as sent and received." CALEA is however limited by its broad exemption of information services. Information services necessarily undergo a change in form or content because they are not "telecommunications" which is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, *without change in the form or content* of the information as sent and received." (Emphasis added).[36] Indeed, under Petitioners' rationale, CALEA's definition of information services may be broader than the Communication Act's because CALEA does not require information services to undergo a change in form or content.

Petitioners indicate additional differences between CALEA and the Communications act to support their overly broad interpretation by stating that CALEA extends to switching as well as transmission, while the Communication Act only extends to entities engaged in transmission.[37] CALEA's use of the terms "switching and transmission", as opposed to the term "transmission" alone, is however absolutely irrelevant to determining whether CALEA's definition of telecommunications carrier applies to any IP-enabled service. The terms switching and transmission are ambiguous terms not defined in either CALEA or the Communications Act. Net2Phone agrees with Petitioners that all services whether circuit-switched or packet-switched entail some form of switching or transmission.[38] It is difficult to imagine any current transmission service that does not involve some type of switching or switching that does not involve some type of transmission. Taking Petitioner's rationale to its ultimate conclusion, even information services clearly excluded from CALEA such as e-mail and instant messaging

[36] 47 U.S.C. §153(43); *See also, Report to Congress* ¶¶24-26.
[37] Petition at 12.
[38] Petition at 13.

could conceivably fall within the scope of CALEA because they encompass some form of switching or transmission. Legislative History however, demonstrates that Congress expressly rejected this argument stating that:

> "[o]nly telecommunications carriers, as defined in the bill, are required to design and build their switching and transmission systems to comply with the legislated requirements. Earlier digital telephony proposals covered all providers of electronic communications services, which meant every business and institution in the country. That broad approach was not practical. Nor was it justified to meet any law enforcement need."[39]

Likewise, Petitioners' approach is not practical or justified to meet any law enforcement need.

Petitioner's attempt to potentially sweep all information services under CALEA would nullify CALEA's express information services exemption causing it to become extraneous. Courts have found that a statute must be read in its entirety and no one portion of the statute should be read to make another portion irrelevant.[40] If Congress would have wanted to amend CALEA to limit the information services exemption in light of IP-enabled services such as broadband access and broadband telephony, it would have done so within the ten years since it enacted the statute in 1994. Foreseeing the potential for Internet technologies, Congress drafted CALEA to not only adapt to, but also, to promote innovation in Internet technologies. In any event, amendment of the statute through regulations inconsistent with CALEA's intent is not within the Commission's authority.

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[39] House Report at 3498-3499.

[40] *See United States Telecom Ass'n v. FCC,* 343 U.S. App. D.C. 278, 227 (D.C. Cir. 2000) (noting "the well-accepted principle of statutory construction that requires every provision of a statute to be given effect"); *Oi-Zhuo v. Meissner,* 315 U.S. App. D.C. 35 (D.C. Cir. 1995) (courts have "endlessly reiterated [the] principle of statutory construction . . . that all words in a statute are to be assigned meaning, and that nothing therein is to be construed as surplusage." and "If a statute defines a term in its definitional section, then that definition controls the meaning of the term wherever it appears in the statute."

B. The Commission Cannot Support Petitioners Analysis Under The Second Part Of CALEA's "telecommunications carrier" Definition.

Petitioners contend that even if the Commission finds that IP-enabled services do not fall within the first part of CALEA's definition of telecommunications carrier, that they fall within CALEA's alternative definition related to electronic communications.[41] In order to deem a provider of a non-common carrier service to be a telecommunications carrier under CALEA, the Commission must determine that the "person or entity [is] engaged in providing wire or electronic communication switching or transmission service *to the extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of this title.*" (Emphasis added).[42] Legislative History provides guidance on how the to apply this alternate definition of "telecommunications carrier" by stating that:

> "the FCC is authorized to deem other persons and entities to be telecommunications carriers subject to the assistance capability and capacity requirements to the extent that such person or entity serves as a replacement for the local telephone service to a substantial portion of the public within a state. As part of its determination whether the public interest is served by deeming a person or entity a telecommunications carrier for the purposes of this bill, the Commission shall consider whether such determination would promote competition, encourage the development of new technologies, and protect public safety and national security."[43]

The Commission must therefore engage in a three-part analysis. First, the Commission must determine that the service is not an information service, as discussed above. Second, the Commission must determine that the new service is a replacement for the local telephone service to a substantial portion of the public within a state on an

[41] Petition at 11.
[42] 47 U.S.C. 1001(8)(B)(ii).
[43] House Report at 3500-3501.

entity-by-entity basis. Third, even if the Commission determines that an entity's service replaces a substantial portion of local telephone service, it must consider whether such a determination would be in the public interest through promotion of competition, technological development, and protection of public safety and security. Petitioner's analysis fails on all fronts of this three-pronged test.

Broadband Access and Broadband Telephony Are Information Services.

The Commission has not determined that any broad range of IP-enabled communications or broadband applications are telecommunications services. Petitioners however imply that CALEA's alternative definition of telecommunications carrier limits the information services exemption.[44] As discussed throughout these Reply Comments, the opposite is true. CALEA's information services exemption governs whether a service may be included in the category of telecommunications carrier.[45] Accordingly, the Commission's analysis of broadband access and broadband telephony may stop here. However, even if the Commission determines that any IP-enabled service is not exempt as an information service, which it should not, Petitioners' requests fail under the remaining portions of the substantial replacement test.

No IP-Enabled Service Is A Substantial Replacement For The Local Telephone Service In Any State.

Petitioners contend that broadband access is a substantial replacement for local exchange service because "local exchange service" refers to narrowband 'dial-up'

[44] Petition at 14 that "CALEA does not categorically exclude providers of information services from the definition of 'telecommunications Carrier'."
[45] MCI at 14.

Internet access service.[46] Legislative History shows that local exchange service refers to traditional local telephone service as opposed to information services "such as electronic mail providers, on-line services providers…or Internet service providers."[47]

While Petitioners devote a great deal of the Petition to discussing the growth of IP-telephony in the future, they fail to provide any evidence demonstrating that all IP-enabled voice services, let alone any single IP-enabled voice service substantially replaces local telephone service within any state now.[48] Even if any single provider served one million lines nationwide, this would only constitute approximately 5% of all local access lines.[49] The largest provider of IP-telephony in the U.S. serves no more than 0.27% of lines nationwide.[50] Even wireless, which has a far greater penetration than any IP-telephony service, has not been deemed a substantial replacement for local telephone service. Petitioners cannot point to a single IP-telephony provider whose particular service replaces a substantial portion of the local telephone service in any state. Moreover, CALEA permits the Commission to analyze services that are current replacements for a substantial portion of local telephone service, and not before as Petitioners suggest.

Imposing CALEA On Information Services Is Not In The Public Interest

Congress envisioned that public interest is best served by balancing Law Enforcement's surveillance needs without risking technological innovation or the privacy of individuals. Petitioners seek to undermine the careful balance struck by Congress in

[46] Petition at 24.
[47] House Report at 3501.
[48] Petition at
[49] FCC, Industry Analysis and Technology Division, Wireline Competition Bureau, *Local Telephone Competition: Status as of June 30, 2003* (Dec. 2003) at Table 1 showing 182.8 million local access lines nationwide.
[50] AT&T at 17.

favor of broadening their surveillance abilities to the Internet. Petitioner's devote little to no discussion of how approval of their Petition would be in the public interest. There still exist concerns securing the Internet, which is more prone to hackers and viruses than the closed circuit-switched network where the government has traditionally carried out electronic surveillance. The industry is working towards eliminating these security risks by creating standards specific to IP technologies. Providers are developing and implementing protections within their networks to ensure customer privacy. Building additional interception capabilities onto the Internet before the industry is ready may compromise security and privacy by opening new doors to breaches.

Forcing CALEA onto all information services such as broadband telephony and broadband access would chill innovation because providers would be required to fit these new technologies into surveillance requirements created to function in a circuit-switched environment. Providers of IP-enabled services would also need to divert significant resources from research and development to replicating traditional surveillance capabilities.

II. The Commission Cannot Circumvent CALEA's Procedures.

Petitioners ask that the Commission adopt rules providing for easy and rapid identification of future CALEA-covered services and entities at a minimum stating that: 1) a service that competes against a service already deemed covered by CALEA is presumptively covered by CALEA; 2) an entity engaged in providing wire or electronic communications switching or transmission service to the public for a fee is covered by CALEA; and 3) a service using any packet-mode technology covered by CALEA that

begins to provide a different technology will continue to be subject to CALEA.[51] The Petitioners request is in direct violation of the express language of the statute.

The Commission does not have the authority to adopt Petitioners' recommended rules because CALEA already contains procedures for the Commission to determine whether a new service falls within the statute. The Commission used this analysis in the Second Report and Order to impose CALEA obligations on specific telecommunications services.[52] The Commission cannot circumvent CALEA's procedures solely in favor of a mechanism that is more convenient and cost effective for Petitioners. Had Congress wanted to ease the Commission's analysis under CALEA or to broaden CALEA in any way, it would have amended the statute within the 10 years since its enactment. Absent amendment, the Commission must adhere to the existing procedures in CALEA.

The minimum criteria recommended by Petitioners for identification of future technologies subject to CALEA runs afoul of the express language of the statute. As stated above, if a service is not an information service and is not provided on a common carrier basis, the Commission must engage in the three-part analysis to determine whether the provider's service is a replacement for a substantial portion of the local telephone service in a state. Identification of future services subject to CALEA based on Petitioners' recommended rules would effectively rewrite CALEA, a task solely left to Congress.

The Commission should also reject Petitioners' recommendation that providers file petitions for clarification before offering new services. CALEA was carefully drafted to promote the development and deployment of new technologies. To that end, CALEA

[51] Petition at 33-34.
[52] *See* generally, Second Report and Order.

not only exempts information services, but also expressly prohibits law enforcement from dictating system design features or barring the introduction of new features and technologies. By requesting what amounts to pre-approval of services, the Petitioners ask the Commission to limit the types of technologies, facilities, services and features that may be used to provide a new service. Providers would not develop applications, technologies, or services that are different than those presently subject to CALEA because they would not receive approval to deploy services that are not CALEA compliant. The resulting effect proves disastrous for innovation in stark contrast to Congress' express intent.

In effect, Petitioners ask the Commission to do what Petitioners cannot do directly themselves -- namely, dictate the types of technologies that can be deployed under CALEA. However, the Commission does not have that authority either. Congress explained that only:

> "Courts may order compliance and may bar the introduction of technology, but only if law enforcement has no other means reasonably available to conduct interception and if compliance with the standards is reasonably achievable through application of available technology. This means that if a service of technology cannot reasonably be brought into compliance with the interception requirements, then the service or technology can be deployed. This is the exact opposite of the original versions of the legislation, which would have barred introduction of services or features that could not be tapped."[53]

CALEA also establishes a reasonableness standard of compliance for carriers and manufacturers by providing a safe harbor.[54] The Commission's authority extends only in so far as setting technical requirements or standards in the absence of sufficient industry standards, and only where such requirements, minimize the cost on ratepayers and serve the policy of the United States to encourage the provision of new technologies and

[53] House Report at 3499.
[54] 47 U.S.C. 1006(a).

services to the public.[55] The Petition would have the Commission set standards regardless of the industry's efforts, impediments to new technologies, and at a significant cost to ratepayers.[56] Rather than permitting federal agencies to predetermine the types of services and technologies that would be subject to CALEA in the future, Congress provided a mechanism for the industry to develop its own solutions.[57] Industry associations such as PacketCable and TIA are already developing CALEA solutions specific to IP technologies. The Commission should therefore reject any attempts by Law Enforcement to create a veto-type power over new technology and service deployments.[58]

III. Approval Of The Petition Is Not Necessary.

By balancing law enforcement's surveillance needs with Congress' intent to promote innovation, Congress reasoned that:

> "while the bill does not require reengineering of the Internet, nor does it impose prospectively functional requirements on the Internet, this does not mean that communications carried over the Internet are immune from interception or that the Internet offers a safe haven for illegal activity. Communications carried over the Internet are subject to interception under Title III just like other electronic communications. That issue was settled in 1986 with the Electronic Communications Privacy Act. The bill recognizes, however, that law enforcement will most likely intercept communications over the Internet at the same place it intercepts other electronic communications at the carrier that provides access to the public switched network."[59]

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[55] 47 U.S.C. 1006(b).
[56] Petition at 64, requesting the Commission to establish rules permitting carriers to recover costs of CALEA compliance from their customers. *See* Comments of United States Telecom Association (USTA) at 8-9.
[57] 47 U.S.C. 1006(a).
[58] Comments of Covad Communications ("Covad") at 3-4; AT&T at 17-18.
[59] Legislative History at 3503-3504.

As several commenters illustrate, denial of the Petition would not limit Law Enforcement's broad access to communications carried over the Internet under existing laws.[60] In fact, CALEA was not enacted to provide Law Enforcement with the easiest type of access possible. Instead, Congress sought to preserve existing surveillance capabilities in light of new technologies and used CALEA to fill the gaps where other law may have been lacking. By creating a broad exemption for information services, Congress believed that it was not necessary to supplement existing laws with regards to surveillance of the Internet. CALEA was not intended to provide additional tools for Law Enforcement to access the Internet. Petitioners however seek to use CALEA to make surveillance easier at the expense of innovation and contrary to clear statutory purpose. Congress however warned that CALEA "is not intended to guarantee 'one-stop-shopping' for law enforcement" as Petitioners suggest. It is therefore unnecessary to extend CALEA's network capability requirements and significant associated costs beyond its narrow scope.

[60] AT&T at 5, 7; Covad at 3; MCI at 3-7; ACLU at 2-3.

Conclusion

For the reasons stated herein, Net2Phone recommends that the Commission should deny the Petition.

Respectfully submitted,

__[electronically filed]____

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